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No. 01-1317

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,
Petitioner,

v.

RJ REYNOLDS TOBACCO HOLDINGS, INC.; RJ REYNOLDS TOBACCO COMPANY; RJ REYNOLDS TOBACCO INTERNATIONAL, INC.; RJR-MACDONALD, INC.; RJ REYNOLDS TOBACCO COMPANY, PR; NORTHERN BRANDS INTERNATIONAL, INC.; AND CANADIAN TOBACCO MANUFACTURERS COUNCIL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. Canada Has a U.S. Fraud Claim, Not a Canadian Tax Claim. 1

2. The Revenue Rule Has No Application Here, as a Matter of Case Law, or Policy, or Treaty. 2

3. The Second Circuit's Misinterpretation Is Important. 7

4. The Court Should Grant the Writ Despite the Absence of a Circuit Conflict. 8

5. The Question Is Squarely Presented. 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Pages

Banco do Brasil, S.A. v. A.C. Israel Commodity Co., 190 N.E.2d 235 (N.Y. 1963) 4

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 6

Her Majesty the Queen in Right of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979) 3

Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930) 4

The European Community v. Japan Tobacco, Inc., 186 F. Supp. 2d 231 (E.D.N.Y. 2002) 7

The European Community v. RJR Nabisco, Inc., 150 F. Supp. 2d 456 (E.D.N.Y. 2001) 8

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 6

INTERNATIONAL TREATIES

Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087 6

Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9, 1995, U.S.-Can., Art. XXV1 A(2), 1 Tax Treaties (CCH) ¶ 1901.261 6

INTERNATIONAL CASES

Government of India v. Taylor, [1955] A.C. 491 3

Peter Buchanan Ltd. v. McVey, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89, 115 (Ir. S.Ct. 1951) 5

Peter Buchanan Ltd. v. McVey, [1955] A.C. 516 3

QRS 1 ApS v. Frandsen, [1999] 1 W.L.R. 2169 ..... 3, 5

TABLE OF AUTHORITIES—Continued

Pages

Re Reid, [1970] 17 D.L.R. (3d) 199 (British Columbia Court of Appeal) 3

Re Sefel Geophysical Ltd., [1988] 54 D.L.R. (4th) 117 (Alta. Q.B.) (Alberta Court of Appeal) 3

Re State of Norway's Application (Nos. 1 and 2), [1990] 1 A.C. 723 (House of Lords) 3

Stringam v. Dubois, [1993] 3 W.W.R. 273 3

United States v. Harden, [1963] S.C.R. 366 (Sup. Ct. Can.) 4

Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., [1986] 1 A.C. 368 (House of Lords) 3, 5

INTERNATIONAL STATUTES

Customs Act R.S.C. 1985, c.1 (2d Supp.), as amended §§ 17, 32 2

BOOKS, ARTICLES & TREATISES

The Federalist No. 35 (A. Hamilton) (Kramnick ed. 1987) 7

Restatement (Third) of the Law of Foreign Relations § 483 (1987) 5

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PETITIONER'S REPLY BRIEF

The question whether foreign nations may sue smugglers operating in the United States for violations of U.S. law is important, wrongly decided below, and squarely presented. The issue is *not* whether RICO "overrode" the revenue rule and opened U.S. courts to foreign tax claims: no one is asserting any such thing. It is whether RICO will be applied as written against fraud committed in the United States—or be subjected to the unwritten exception created in this case. If respondents were right, foreign nations would have no U.S. remedy for serious U.S. misconduct, and Congress would have no "private attorney general" to combat such U.S. smugglers.

1. Canada Has a U.S. Fraud Claim, Not a Canadian Tax Claim. Respondents committed extensive fraud in the United States: *among other things, they formed a U.S. corporation to operate a smuggling scheme from Winston-Salem, manufactured billions of "Canadian" cigarettes in Puerto*

Rico, and transported these and other "Canadian" cigarettes to upstate New York for smuggling into Canada—and one of the respondents and one of its officers pled guilty to U.S. crimes. See Canada's Petition ("Pet.") 3-4. Their violations of U.S. laws deprived Canada, a "person," of "property," including tax revenues. Canada's suit squarely fits the language and serves the central purpose of civil RICO: to make America a more lawful place by punishing and deterring criminal conduct in this country.

Canada is not asking a U.S. court to enforce its tax laws, directly or indirectly. Canada's tax laws impose import taxes and duties only on persons who bring taxable items across its borders. *See* Customs Act R.S.C. 1985, c.1 (2d Supp.), as amended §§ 17, 32. In this case, those persons were street-level smugglers aided and abetted by the 21 individuals who pled guilty to a U.S. indictment. *See* Pet. App. A5-A6.

Canada may have a "tort" claim against respondents under Canadian law, but it is for acts of racketeering committed primarily by U.S. persons, primarily in the United States, in violation of U.S. statutes. Respondents' assertion that Canada could take other steps to recover for U.S. fraud is entirely misplaced: enforcement of U.S. laws against U.S. misconduct does not and should not depend on the legal remedies available in other countries. A U.S. court was the *right* place for Canada to bring these claims.

2. The Revenue Rule Has No Application Here, as a Matter of Case Law, or Policy, or Treaty. The revenue rule bars foreign nations from bringing claims arising under their own tax laws in U.S. courts. *See* Pet. 9-11. Although the rule has been much criticized, *see* Pet. 10 n.5, Canada is *not* arguing either that it should now be abandoned or that RICO somehow "overrode" it. The rule has never (until now) been applied to bar civil claims arising under the law of the *forum* nation, and neither cases nor policy considerations suggest that it should be so expanded.

Cases applying the rule. Respondents' cases *applying* the revenue rule all involved attempted enforcement of foreign tax law or foreign tax judgments, not claims arising under the law of the forum. *See Her Majesty the Queen in Right of British Columbia v. Gilbertson*, 597 F.2d 1161, 1163-66 (9th Cir. 1979) (attempted enforcement of British Columbia tax judgment in U.S. court); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 283 (attempted enforcement of U.S. tax claim in Canadian court); *Government of India v. Taylor*, [1955] A.C. 491, 492-93, 503-05 (attempted enforcement of Indian tax claim in British court); *Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516, 524-26 (attempted enforcement of Scottish tax claim in Irish court), 532-33; *QRS 1 ApS v. Frandsen*, [1999] 1 W.L.R. 2169, 2176-77 (attempted enforcement of Danish tax claim in British court).

Cases declining to apply the rule. By contrast, courts have invariably declined to apply the revenue rule to civil claims arising under, or legal issues turning on, the law of the forum, even where foreign tax or other revenues were involved. *See Re State of Norway's Application (Nos. 1 and 2)*, [1990] 1 A.C. 723, 809 (House of Lords) (revenue rule inapplicable to taking of evidence under forum law even though evidence was being gathered to prosecute a tax claim in Norway); *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] 1 A.C. 368, 428, 430, 437, 440-41 (House of Lords) (revenue rule inapplicable to claims based on forum's contract law and trust law); *Re Sefel Geophysical Ltd.*, [1988] 54 D.L.R. (4th) 117, 126-28 (Alta. Q.B.) (Alberta Court of Appeal) (revenue rule inapplicable to claims based on forum's bankruptcy law); *Re Reid*, [1970] 17 D.L.R. (3d) 199, 202-06 (British Columbia Court of Appeal) (revenue rule inapplicable to claims based on forum's law governing administration of estates).

"Indirect" enforcement. Respondents argue (Brief in Opposition ("RBr.") 14) that the rule bars "indirect" as well as direct enforcement of foreign tax laws. But Canada is not

seeking indirect enforcement here. Canada is seeking damages for fraud, in full accordance with a U.S. statute, and its revenue laws come into play only as one measure of what it has lost. None of respondents' three cases remotely suggests that U.S. courts should not enforce U.S. statutes against fraud, merely because the property taken is defined by foreign law:

— In *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963) (RBr. 14), plaintiff sued in New York for violation of *Brazilian* currency regulations, claiming that these violations gave it a cause of action under the "Bretton Woods Agreement." The court ruled that the Agreement "imposes no obligation . . . on individuals [i.e., private persons]" such as the *Banco* defendant, 190 N.E.2d at 237, a ruling that has no bearing on this case. Canada has precisely what the *Banco* plaintiff lacked: a U.S. cause of action that Congress deliberately gave to "any person."

— In *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929), *aff'd on other grounds,* 281 U.S. 18 (1930) (RBr. 14), the treasurer of an Indiana county brought suit "to recover [Indiana] taxes alleged to be due and unpaid." 30 F.2d at 601. The court applied straightforward revenue rule analysis to bar the treasurer from maintaining a claim arising under Indiana tax law in a federal court in New York. L. Hand, J., concurring, noted correctly that the revenue rule analysis itself was a matter of the law of the forum, New York. *Id.* at 603. There was no dispute that the claim on the merits arose under Indiana tax law—and no suggestion that an agency of Indiana could not have maintained an otherwise valid claim under New York law in a New York court.

— In *United States v. Harden*, [1963] S.C.R. 366 (Sup. Ct. Can.) (RBr. 14-16), the United States sought to collect in a Canadian court on a stipulated tax judgment entered by a U.S. district court on a U.S. tax claim. The United States said it had a "contract" claim because Harden had stipulated to the U.S. tax judgment, but it was transparently attempting

simply to collect on that judgment. The Supreme Court of Canada's rejection of the claim rested on the black-letter formulation of the revenue rule: one country (Canada) will not "enforce judgments for the collection of taxes . . . rendered by the courts of other states [the U.S.]." *Restatement (Third) of the Law of Foreign Relations* § 483 (1987).

"Indirect" enforcement, as that term is used in discussions of the revenue rule, has always referred to uses of forum courts as mere vehicles for claims whose legal force comes only from foreign tax law, such as in cases seeking enforcement of foreign tax judgments.[1] To repeat, *no* prior authority suggests that the revenue rule bars claims in U.S. courts under U.S. law merely because part of the property the defendants took was foreign taxes.

Policy Issues. All of the "policy" arguments in favor of the revenue rule have no bearing on claims arising under a U.S. statute:

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[1] The House of Lords made this clear in *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] 1 A.C. 368, 440-41, distinguishing the earlier decisions (cited at RBr. 15) in *Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89, 115 (Ir. S. Ct. 1951). The Lords explained that the revenue rule bars "indirect enforcement" only in a narrow sense, where there is an outstanding foreign tax claim against the same defendants in the foreign jurisdiction, to which the proceeds of the challenged civil action will be applied. The Lords refused to apply the revenue rule where a claim under the law of the forum merely overlapped with a foreign law remedy: "If the [defendants] are correct and the . . . action . . . attempts indirectly to enforce [foreign] law to which the [forum's] courts will not lend their aid, then the practical effect of the [foreign] law is to release from liability . . . every tortfeasor guilty of inflicting a [forum law] civil wrong. . . . A submission which produces such anarchic results and which releases all wrongdoers from [forum law] liability must be fallacious." *Williams & Humbert*, 1 A.C. at 429. *QRS 1 ApS v. Frandsen*, [1999] 1. W.L.R. 2169, 2177 (British Court of Appeals) (cited at RBr. 15) has a similarly narrow understanding of "indirect enforcement."

— *Unwanted Claims.* There is no risk (*see* RBr. 15-16) of opening U.S. courts to claims under foreign law that the United States may not wish to entertain. Canada is asking the U.S. courts only to enforce a U.S. statute, RICO, as Congress wrote it.

— *Foreign Policy and Separation of Powers.* For similar reasons, the "foreign policy" and "separation of powers" concerns that animated the revenue rule (*see* RBr. 1; Pet. App. A10) have no application. Congress and the President performed their pertinent constitutional roles by enacting the federal statutes under which Canada's claim arises. They have no further general role: in U.S. jurisprudence, foreign nations do not need Executive Branch permission to bring valid claims under U.S. statutes, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964), and entertaining Canada's U.S. statutory claim would not in any way invade the powers of the political branches. On the contrary, in this case, Reynolds has asked the courts to invade Congress's prerogatives by creating an unwritten (and wholly unevidenced) exception to the statute Congress wrote. The foreign policy embarrassment in this case is denying a foreign nation a claim under U.S. law that Congress clearly gave it.

— *The U.S.-Canada Tax Treaty.* The Treaty also has no proper bearing on the issues in this case. *Cf. United States v. Alvarez-Machain,* 504 U.S. 655, 666-68 (1992). The Treaty specifies the instances in which each country will assist the other in enforcing its own tax laws against persons liable for its taxes. It says nothing about the rights of either country to bring claims arising under the laws of the other country. Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087; Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9,

1995, U.S.-Can., Art. XXV1 A(2), 1 Tax Treaties (CCH) ¶ 1901.261, at 21,005-26.

— *Litigation Practicalities.* There is also no practical reason to dismiss Canada's claim at this stage. Canada will, to be sure, have to prove aspects of its tax laws to show that Reynolds' actions injured Canada "in its . . . property." But respondents do not assert that there will be any material dispute, and federal courts are ordinarily fully capable of determining matters of foreign law that arise in the course of applying a U.S. federal statute.

— *Promoting U.S. Trade.* Finally, Reynolds should blush to argue (RBr. 5) that this Court should assist "U.S. traders" by affirming a newly invented bar against the enforcement of longstanding U.S. statutes outlawing fraudulent activities. Smuggling-related activities carried out in the United States by U.S. persons hurt everyone: "[A] general spirit of smuggling . . . is always prejudicial to the fair trader, and eventually to the revenue itself . . . ." The Federalist No. 35, at 231 (A. Hamilton) (Kramnick ed. 1987).

3. The Second Circuit's Misinterpretation Is Important. The importance of this case goes far beyond the dollars at issue here and in *The European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002). The question is whether the victims of a criminal smuggling enterprise will have any remedy at all in the country whose laws were violated, where the perpetrators reside and where they principally conducted their smuggling scheme.

Congress authorized civil RICO claims not only to compensate victims of criminal enterprises but to punish and deter crime that is harmful to U.S. society. Like other criminal activity, smuggling activities here do not merely steal from their direct victims—foreign countries; they distort lawful competition and engender an atmosphere of lawlessness that corrupts U.S. individuals and corporations. Congress determined to punish fraudulent activities—including the actions alleged in this case—severely, and it was entirely inappropri-

ate for a federal court to create an exception where the victim is a foreign country.

Respondents assert (RBr. 11) that the decision below will not "require[] countries to abandon efforts to stop cross-border tax evasion and smuggling," but it will most certainly cripple those efforts. The decision would deny victim countries any remedy in the courts of the countries where smugglers operate in violation of local law. Congress explicitly recognized the importance of a civil remedy—including treble damages—to punish and deter the kinds of conduct Reynolds engaged in here, and "efforts to stop cross-border tax evasion and smuggling" obviously must, to be effective, include efforts in the countries where the evaders and smugglers operate.

4. The Court Should Grant the Writ Despite the Absence of a Circuit Conflict. Although there is no conflict between circuits in this case, the issues have been extensively explored both in the majority and dissenting opinions below and in the lengthy first opinion of Judge Garaufis in the *European Community* case. *The European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483-86 (E.D.N.Y. 2001) (holding, prior to the Second Circuit's decision in this case, that the revenue rule does *not* bar civil RICO claims by foreign sovereigns relating to cigarette smuggling activities in the United States).

Two of the five federal judges that have considered the application of the revenue rule to claims of foreign nations under RICO—Judges Calabresi and Garaufis—have squarely disagreed with the conclusion of the panel majority, suggesting that there is hardly a "universality of opinion" (*see* RBr. 5) on this issue. This disagreement, the extensive exploration, the importance of the question whether foreign nations may pursue U.S. smugglers in this country for violating U.S. law, and the risk that foreign courts will cite and follow the Second Circuit's decision, all combine to make this a case that is both ripe and appropriate for this Court's considera-

tion. There is no reason to force foreign nations to test additional U.S. judicial waters.

5. The Question Is Squarely Presented. The Second Circuit affirmed the dismissal of Canada's complaint on the sole ground that the revenue rule bars Canada's claim. That court's ruling could hardly have been more categorical: the rule, it said, bars foreign nations from bringing claims under U.S. law where their losses include tax revenues, and bars all of Canada's claims, including claims for enforcement expenses, equitable relief, and disgorgement of Reynolds' ill-gotten gains. Pet. App. A10. There is no other issue to becloud the Court's consideration of that ruling.

Reynolds counters lamely (RBr. 17-18) that if the Court were to reverse the Second Circuit Reynolds would have *other* defenses (several of which were rejected by the district court, Pet. App. B18-B30), but that is hardly a reason for not considering the legal question squarely presented by the dismissal. The Court need not be concerned by the threat (*see* RBr. 18) that respondents will devote pages of their merits brief to issues other than the ruling below.

CONCLUSION

For the reasons set forth above and in Canada's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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